
(2004) 07 GAU CK 0006
In the Gauhati High Court
Case No : Writ Petition (C) No. 3402 of 2003

Dhananjay Das

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 21-07-2004

Acts Referred:

Assam Services (Discipline and Appeal) Rules, 1964 — Rule 7
Constitution of India, 1950 — Article 21, 309

Citation : (2004) GLT 814 Supp

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : R. Baruah, A. Senapati and S.H. Bora, for the Appellant; P. Pathak, P. Barman, S. Chakraborty and R. Biswas, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.

1. The decision to recover the entire amount of subsistence allowance paid to the Petitioner during the period he was under suspension is the subject matter of challenge in this writ petition.

2. The Petitioner was placed under suspension in contemplation of a departmental proceeding by an order dated 23.04.92. At that time the Petitioner was holding the post of Tax-Daruga under the Respondents. On revocation of the order of suspension, he was reinstated in service by an order dated 01.10.92. When no proceeding was initiated against him and the order of reinstatement dated 01.10.92 was not given effect to, the Petitioner approached this Court by filing a writ petition which was registered and numbered as Civil Rule No. 356/96. The writ petition was disposed of by an order dated 05.03.93 providing completion of the proceeding within four months and on failure to do so the order of suspension would stand revoked.

3. After the aforesaid order of this Court, a departmental proceeding was drawn

up against the Petitioner and on completion of the same, the disciplinary authority passed an order dated 10.12.93 imposing the penalty of reduction in rank from the post of Tax-Daruga to Assistant Tax-Daruga. By the said order he was directed to join his duties as Assistant Tax-Daruga with a liberty to submit representation, if any. The order came into effect from 13.12.93.

4. Being aggrieved, the Petitioner preferred an appeal before the departmental appellate authority which was disposed of by an order dated 15.07.96 holding that the Petitioner could not have been demoted to the post of Assistant Tax-Daruga inasmuch as his initial appointment was to the post of Tax-Daruga. However, the Petitioner was held guilty according to the findings of the Enquiry Officer and the appellate authority directed the disciplinary authority to impose any other penalty as provided in Rule 7(iii), (v), (vi) and (viii) of the Assam Services (Discipline & Appeal) Rules, 1964.

5. After the aforesaid order of the departmental appellate authority, the disciplinary authority passed an order dated 10.10.96 awarding the penalty of recovery of the pecuniary loss caused to the Municipality Board. The amount to be recovered from the salary of the Petitioner was estimated at Rs. 13,790/-. The penalty was imposed under Rule 7(iii) of the aforesaid Rules of 1964. It was further provided that the period from the date of placing the Petitioner under suspension till the date of his joining the service would be treated as extraordinary leave without pay. After the aforesaid order dated 10.10.96, the disciplinary authority passed yet another order dated 11.12.96 ordering recovery of the subsistence allowance paid to the Petitioner (Rs. 54,680.51) along with the aforesaid amount of Rs. 13,790/-. Such an order of recovery was passed on the ground that by the order dated 10.10.96 the entire period from the date of placing the Petitioner under suspension to the date of his reinstatement/ joining in service was ordered to be treated as extraordinary leave without pay.

6. The Petitioner being aggrieved by the aforesaid orders for recovery of subsistence allowance, made representations to the higher authority. The higher authority upon consideration of the representations submitted by the Petitioner, referred the matter to the competent authority who in turn opined that the subsistence allowance once allowed could not have been ordered to be recovered. As such a review of the order of recovery was advised. When nothing was done the Petitioner preferred a review application before the disciplinary authority, but the same having not yielded any result, approached this Court by filing the instant writ petition.

7. The Respondent Municipal Board has filed an affidavit in opposition justifying the impugned action on the part of the Municipal Board. It is the stand of the Municipal Board in the affidavit that the impugned course of action was adopted as per the order of the appellate authority. Further stand in the affidavit is that the Petitioner has deposited the entire amount in question from his monthly salary and thus, the Petitioner having accepted the order of recovery, is estopped from making a challenge to the impugned action. As against the order of disciplinary

authority holding the Petitioner responsible for loss to the tune of Rs. 13,790/- and directing recovery of the amount, the stand in the affidavit is that the Petitioner is responsible for loss of more than that amount.

8. I have heard Mr. R. Baruah, learned Counsel for the Petitioner and Mr. R Pathak, learned Senior counsel assisted by Ms. R Barman, learned Advocate appearing for the Respondent Municipal Board. Mr. Baruah submitted that the subsistence allowance paid to the Petitioner could not have been recovered by the impugned orders. He submitted that such recovery of the subsistence allowance already paid to the Petitioner amounts to non-payment of subsistence allowance during the period of suspension which is impermissible in law. Mr. Pattiak on the other hand, justified the impugned action of the disciplinary authority. He submitted that the conduct of the Petitioner which led to the loss of revenue to the Board was viewed seriously by the Disciplinary authority and accordingly, it was felt that the Petitioner was not entitled to receive any salary for the period of suspension. He submitted that the impugned order dated 10.10.96 having been passed pursuant to the order of the disciplinary authority providing to treat the entire period of absence as extraordinary leave without pay, there was nothing wrong in ordering the recovery of the subsistence allowance which was already paid to the Petitioner. He submitted that an order for treating a particular period as extraordinary leave without pay would necessarily entail nonpayment of salary to the Petitioner and it was under such circumstances, the order for recovery of the subsistence allowance already paid to the Petitioner had to be ordered. He further submitted that the Petitioner having accepted the order of recovery could not have made a challenge to the same by filing the instant writ petition and that he was estopped from doing so.

9. I have considered the rival submissions made by learned Counsel for the parties. I have also considered the materials available on record. It is a settled law that if an employee is put under suspension, the relation between employee and employer does not come to an end, it is only suspended temporarily. During this period the employee can neither take any employment elsewhere nor undertake any profession or trade, etc. For survival of the employee and his family the employer is to pay subsistence allowance. Payment of subsistence allowance follows from suspension and an employee cannot be deprived of his right. There is no manner of doubt that the Petitioner was entitled to subsistence allowance during the period of his suspension and in fact, he was paid the same. However, with the passing of the impugned orders directing substitution of penalty of reduction in rank and treating the period of suspension as the period of extraordinary leave without pay, the amount of subsistence allowance paid to the Petitioner was recovered from his salary virtually resulting in non-payment of subsistence allowance to the Petitioner during the period of his suspension.

10. The Petitioner has the right to receive the subsistence allowance during the period of suspension and in fact, he was paid the said allowance. On conclusion of the departmental proceeding he was sought to be demoted to a post which

was lower than the one to which he was initially appointed. It was on that ground the departmental appellate authority held the order of penalty to be illegal by which the Petitioner was sought to be demoted to the post of lower than the one to which he was initially appointed. However, it prescribed for imposition of any of the penalties under Rule 7(iii) or (v), (vi) and (vii) of the Assam Services (Discipline & Appeal) Rules, 1964 having found that the charges against the Petitioner were established. Pursuant to such a decision of the appellate authority, the disciplinary authority decided to impose the penalty of recovery of the pecuniary loss caused to the Municipal Board which is one of the prescribed penalties as per the provisions of the Rule 7(iii) of the aforesaid Rules. The pecuniary loss caused to the Municipal Board was estimated at Rs. 13,790/ However, it was also provided that the period of suspension would be treated as a period under extra ordinary leave without pay which resulted in the impugned order of recovery of the subsistence allowance. Such a course of action could not have been adopted by the disciplinary authority making a mockery of the very purpose and the object of payment of subsistence allowance to an employee during the period of suspension. The Apex Court in the case of Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, dealing with the question of non-payment of subsistence allowance and the effect of the same observed as follows:

On joining Govt, service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Govt. The Govt., only because it has the power to appoint does not become the master of the body and soul of the employee. The Govt, by providing job opportunities to its citizens only fulfils its obligations under the Constitution including the Directive Principles of the State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the government or any other employer, like Instrumentalities of the Government or Statutory or Autonomous Corporations etc., is regulated by the terms of contract of service or Service Rules made by the Central or the State Government under the proviso to Article 309 of the Constitution or other Statutory Rules including Certified Standing Orders. The Fundamental Rights, including the Right to Life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the Service Rules only ensures non-violation of the right to life of the employee. That was the reason why this Court in State of Maharashtra Vs. Chandrabhan Tale, struck down a Service Rule which provided for payment of a nominal amount of Rupee one as Subsistence Allowance to an employee placed under suspension. This decision was followed in Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another, and it was held in that case that if an employee could not attend the departmental proceedings on account of financial stringencies caused by non-payment of Subsistence Allowance, and thereby could not undertake a journey away from his home to attend the departmental proceedings, the order of

punishment, including the whole proceedings would stand vitiated. For this purpose, reliance was also placed on an earlier decision in Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh,

11. The Apex Court in the aforesaid case after observing as above and noticing that the Appellant was not paid his subsistence allowance during the period of suspension held that the Appellant was punished in total violation of the principles of natural justice.

12. Although a stand has been taken in the affidavit that the impugned course of action for recovery of the subsistence allowance paid to the Petitioner was adopted as per the order of the departmental appellate authority, the records do not reveal anything justifying such a course of action. Even if such a course of action had been ordered, same would be contrary to the object and purpose of payment of subsistence allowance during the period of suspension. The disciplinary authority assessed the amount of pecuniary loss caused to the Municipal Board as Rs. 13,790/- and on that basis the amount was ordered to be recovered from the salary of the Petitioner on suitable instalments. However, while ordering recovery of the estimated pecuniary loss, the disciplinary authority also provided that the period of suspension should be treated as extraordinary leave without pay. It was on that basis the order for recovery of the entire amount of subsistence allowance paid to the Petitioner was passed.

13. After the order of penalty of recovery of the pecuniary loss caused to the Municipal Board, it was incumbent on the part of the disciplinary authority to issue notice to the Petitioner about the proposed action to treat the period of suspension in a particular manner. This was admittedly not done. It is true that with the passing of the order of penalty, further provision is required to be made regarding the period of suspension as to how the same should be treated. However, by no stretch of imagination such a course of action can result in treating the period as extraordinary leave without pay resulting in recovery of the entire subsistence allowance paid to the incumbent during suspension. Adding insult to the injury, the Petitioner was also not put to any notice before taking such a drastic action.

14. The plea of the Respondents that the Petitioner accepted the recovery of the subsistence allowance by way of allowing deduction of the entire amount from his salary on instalments is also not equally sustainable. The plea of estoppel cannot operate against law. As already held above, the law on payment of subsistence allowance to an incumbent placed under suspension is well established. The Petitioner who was placed under suspension could not have been denied his subsistence allowance during the period of suspension and in fact, he was paid the same. Such payment of subsistence allowance could not have been ordered to be recovered rendering the very object and purpose of payment of subsistence allowance meaningless. The Petitioner was not even put to notice before the order of recovery of the subsistence allowance and the same was made behind his back without following any procedure known to law.

15. There has, thus, been a flagrant violation of the principle of natural justice and the Petitioner has been put to financial loss without being heard. Fair play in action warrants that no such order which has the effect on an employee to suffer civil consequence should be passed without putting the concerned to notice and giving him a hearing in the matter. In the instant case not to speak of issuing any notice to the Petitioner, the disciplinary authority have ignored the recommitment made by the higher authority not to make any recovery of subsistence allowance already paid to the Petitioner.

16. As regards the plea of estoppel on the part of the Petitioner, apart from the fact that the Respondents in their capacity as a model employer cannot be permitted to raise such an argument. The undertaking allegedly given by the Petitioner cannot be enforced in law. Even if such an undertaking was given by the Petitioner towards recovery of the entire amount of subsistence allowance, same would be contrary to law and also against the public policy. It would therefore, be unenforceable in law as has been held by the Apex Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, that an unconscionable bargain or contract is one which is irreconcilable with what is right or reasonable or the terms of which are so unfair and unreasonable that they shock the conscience of the Court. The test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power is another theory recognized in the sphere of law of contract. The Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or a clause in a contract, entered into between the parties who are not equal in bargaining power.

17. For the foregoing reasons, discussions and conclusions, I am of the considered opinion that the impugned orders dated 10.10.96 and 11.12.96 in so far as the same relate to recovery of subsistence allowance paid to the Petitioner during the period of suspension, are not sustainable in law and accordingly same stand set aside and quashed. The amount of subsistence allowance recovered from the Petitioner shall be refunded back to him within six months from today.

18. The writ petition stands allowed. There shall be no order as to cost.